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Municipal Corporations: Abolition of the Doctrine of Immunity

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court's decision is based only upon the particular fact situation presented and the "essence of the marriage contract" rule is not thereby overruled, does it remain the Wisconsin test, or is some new rule being promulgated by the court? The court does not specifically answer the question and necessarily, therefore, leaves it open for interpretation. In not overturning previous decisions it would seem that fact situations similar to those previously presented for adjudication would remain grounds for the granting or denial of relief under the rule of *stare decisis*. Under this rule the court would allow annulments for misrepresentations as to the presence of a venereal disease, pregnancy by another, and pregnancy when no pregnancy exists, and deny annulments for misrepresentation as to religious belief, age, prior chastity and financial status (the latter being set out specifically in the principal case). In the same vein it is likely that any different, new, or distinguisable fact situations may be adequate grounds for relief under the "but for" rule stated in the principal case. This analysis envisions the use of two rules, an inherently inconsistent procedure in the law.

It would therefore, be more logical to pick one of the following interpretations: (1) that when the fraud is deemed material as to the induced consent the court will adopt the new "but for" rule and make all previous decisions reviewable, with the possibility of a denial for public policy reasons; in essence the court would decide such issues on a case by case basis, or (2) that the "but for" rule may only be applied to facts similar to those in the instant case to circumvent a seeming injustice, and the rule that the alleged fraud must go to the "essence of the marriage contract" remains the test in Wisconsin.

The most logical conclusion is that the court has now adopted a two-step plan for deciding these cases. First, the fraud must be material and, second, if it is material they will apply the new "but for" rule. The "essence of the marriage contract" rule, pursuant to this reasoning, must be regarded as overturned, and the fact situations decided under that rule are reviewable. Due to the qualification in the principal case that relief in some fact situations may be denied on public policy grounds, it seems that the court shall proceed in this area on a case by case basis, that is, a balancing of the equities in each instance to determine the just solution for each problem presented.

EDMUND CHMIELINSKI

Torts—Municipal Corporations—Abolition of the Doctrine of Immunity: A widow brought an action against the city for the death of her husband, a mover, resulting from a fall down an elevator

shaft in a municipally owned building. Walking backwards, carrying furniture, plaintiff's decedent fell down an allegedly unguarded opening. The suit was bought on the theory that negligence constituted the proximate cause of the death. At the hearing, the fact that the city was engaged in a governmental rather than a proprietary function was determined. Consequently, the motion to dismiss made by the city on the ground that the building where the injury occurred was used solely for governmental purposes and the city was, therefore, not liable in damages, was granted by the Circuit Court. From this decision, plaintiff appealed, and the Supreme Court of Michigan, by an equally divided court, affirmed as to the case at bar, but by a five-to-three split prospectively overruled the doctrine of immunity of municipal corporations from tort liability. Thus, Michigan became the latest in the list of states to overrule this doctrine and follow the general trend toward abolition or immunities.[1] *Williams v. City of Detroit,* ——Mich.——, 111 N.W. 2d 1 (1961).

Recently the Wisconsin Supreme Court, in *Kojis v. Doctor's Hospital,*[2] followed the Michigan Court's decision in *Parker v. Port Huron Hospital,*[3] and abolished charitable immunity. In doing so, the Wisconsin Court relied heavily on the Michigan Court's language in the *Parker* case. Since it has been pointed out that the doctrine of municipal immunity is closely related to that of charitable immunity,[4] the rationale of this case may indicate the future of municipal liability in Wisconsin.

The rule, which was adopted by the courts of the country in an era when many municipal units were small and struggling, was justified on one or more of the following grounds, all of which have arisen to plague these same forums when attempting to abolish it. The ancient theory continues to prevail that the sovereign has immunity from suit which is extended to the municipality as his representative. This seems to be the approach followed in Wisconsin.[5] A practical explanation has been advanced in the idea that it is more expedient for individuals to bear the burden than inconveniencing the public as a whole. Finally, a public policy argument has been used based on the expectation that governmental agents would carry out their functions more effectively when not precluded by the fear of liability. The volume of legal writing on the subject, and more recently case law, has developed equally classical answers. First, immunity from suit does not necesarily belong to a democratic "sovereign". Second, even public inconvenience does not

[1] See 60 A.L.R. 2d 1198 (1958).
[2] 12 Wis. 2d 367, 107 N.W. 2d 131 (1961); Supplemental Opinion, 12 Wis. 2d 367, 107 N.W. 2d 292 (1961).
[3] 361 Mich. 1, 105 N.W. 2d 1 (1960).
[4] Thomas v. Broadlands Community Consol. School Dist., 348 Ill. App. 567, 109 N.E. 2d 636 (1952).
[5] Britten v. City of Eau Claire, 260 Wis. 382, 51 N.W. 2d 30 (1952).

justify the destruction of individual rights. And, lastly, negligent and tortious conduct by government should be "hampered"—not encouraged.[6]

The evident dissatisfaction with the doctrine has led to some ameliorating efforts on the part of both the courts and the legislatures. The basic judicial effort has been in the division of activities carried on by governmental bodies into governmental and proprietary; the immunity from liability extending only to the former.[7] The legislatures have recognized the rule's inherent inequitableness by passing statutes removing certain aspects of municipal operation from its protection. In Wisconsin,[8] the statutory exceptions include the Safe Place Statute,[9] Motor Vehicle Accident Statute,[10] Highway Defects Statute,[11] Mob-Riot Statute,[12] and Judgments Against Public Officers Statute.[13]

The separate opinion written by Justice Black in the *Williams* case points up two basic problems involved in the judicial abrogation of the doctrine, since

> [l]ittle time need be spent in determining whether the strict doctrine of municipal immunity from tort liability should be repudiated. All this is old straw. The question is not 'Should we?'; it is 'How may the body be interred judicially with non-discriminatory last rites?' No longer does any eminent scholar or jurist attempt justification thereof. All unite in recommendation of corrective legislation.[14]

The anomalous result of the case, not wholly supported by seven of the eight justices, resulted from the divergence of views on the role of *stare decisis* and whether immunity should be abrogated prospectively or retrospectively or by something in-between.

The majority of the court in the *Williams* case, in the face of silence on the part of the legislature to the dissatisfaction with the doctrine previously expressed by the court,[15] rejected the view that once a rule has become established, it is a problem for the legislature, inasmuch as any change is the usurpation of a legislative function in contravention to both the Federal and State Constitutions. Their view is well summed up in a quote from Mr. Justice Holmes which they adopt.

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[6] See the classic exposition by Professor Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924-1925), *Governmental Responsibility in Tort*, 36 YALE L.J. 757, 1039 (1926-1927).
[7] PROSSER, TORTS, 774-780 (2d Ed. 1955).
[8] See Bernstern, *Governmental Tort Liability and Immunity in Wisconsin*, 1961 WIS. L. REV. 486, for a definitive discussion of the statutes.
[9] WIS. STAT. §§101.01, 101.06 (1959).
[10] WIS. STAT. §345.05(2)(a) (1959).
[11] WIS. STAT. §81.15 (1959).
[12] WIS. STAT. §66.091 (1959).
[13] WIS. STAT. §270.58 (1959).
[14] Williams v. City of Detroit, ——Mich.——, 111 N.W. 2d 1, 10 (1961).
[15] Richards v. Birmingham School District, 348 Mich. 490, 520, 83 N.W. 2d 643, 658 (1957).

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[16]

The current status of Wisconsin's law in this area is of considerable interest. In *Britten v. Eau Claire,* the Wisconsin Court criticized the doctrine, but stated the legislature should make the change.

> The doctrine that immunity from liability should be granted to the state and municipalities while engaged in governmental opertions rests upon a weak foundation. Its origin seems to be found in the ancient and fallacious notion that the king can do no wrong. The rule is of such long standing and has become so firmly established as a parcel of Wisconsin's jurisprudence, however, that we should hesitate to abandon it. We consider that if it is to be abandoned it is only proper that the request therefor should be made to the legislature. But we do consider that the precedent . . . [lacks] support in both logic and reason. . . .[17]

However, in the *Kojis* case, the court made this statement which seems to indicate the view they would take of the argument against judicial abrogation.

> The defendant insists that if the rule be changed it should be done by the legislature and not by the court. This is upon the theory that questions of public policy are to be determined by the legislature. If that were strictly true then perhaps the court was in error in adopting the doctrine of charitable immunity in the first place. We do not think that is true. We believe the court was justified in acting as it did in 1917 in view of the conditions that then existed. The rule of stare decisis, however desirable from the standpoint of certainty and stability, does not require us to perpetuate a doctrine that should no longer be applicable in view of the changes in present-day charitable hospitals.[18]

Once having determined that the municipal immunity should be abolished, the Michigan Court addressed itself to the question of who should be affected. Justice Black's view on this issue, that although the doctrine of municipal immunities should be abrogated, it should be done wholly prospectively, resulted in the affirmance of the lower court decision. Thus, the question has not been settled in Michigan conclusively. However, when the same court abolished charitable immunities[19] they adopted the policy that the abrogation should be prospective, but that it should also be applied to the case at bar, with a view toward encouraging such pioneering efforts. Moreover, in the *Williams* case four justices adhered to this view, while three, basing their decision

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[16] Williams v. City of Detroit, *supra* note 14, 111 N.W. 2d at 11.
[17] Britten v. City of Eau Claire, *supra* note 5, at 386, 51 N.W. 2d at 32.
[18] Kojis v. Doctor's Hospital, 12 Wis. 2d 367, 372, 107 N.W. 2d 131, 133 (1961).
[19] Parker v. Port Huron Hospital, 361 Mich. 1, 105 N.W. 2d 1 (1960).

solely on *stare decisis,* did not address themselves to the question at all. Wisconsin adopted the approach of the Michigan Court without extended discussion, when it considered charitable immunity in the *Kojis*[20] case. However, it has not directed itself, when applying the new rule to a case at bar, to the question of what weight, if any, should be given to the reasonable expectations of municipal corporations. Such corporations may have not insured themselves, relying on the heretofore settled doctrine of immunity. This is an additional reason for the wholly prospective application of the abrogation urged by Justice Black. The question of whether the municipal corporation had legislative authorization to acquire liability insurance might also be raised,[21] as, on the other hand, might the question of the court finding an implied authorization to purchase such insurance once the court were to remove the immunity.

The *Williams* decision in Michigan may be the forerunner of the abolition of the doctrine of municipal immunity in Wisconsin, paralleling the course of charitable immunity through these same courts.

PATRICIA GODFREY

Condemnation—Public Access to Waterways: With the increasing interest in the various forms of water recreation these days, the decision of the Wisconsin Supreme Court in *Branch v. Oconto County,* 13 Wis. 2d 595, 109 N.W. 2d 105 (1961), is important in the area of conflict which finds interests of riparian landowners and those of the general public adverse to each other when seeking access to waters. In this case[1] the court affirmed the validity of Section 23.09(14)[2] which grants to county boards the power to condemn a right of way for a public highway to any navigable water.

Plaintiff, landowner, had acquired a strip of land surrounding a lake. This lake because of its shallowness and mucky bottom, offered no opportunities for fishing or swimming, but proved to be an excellent site for duck hunting. The public was restricted from use of the lake, except upon payment of a fee to the plaintiff. The county, therefore, petitioned for condemnation pursuant to Section 23.09(14).

The landowner did not contest the issues of necessity or navigability, but claimed that Section 23.09(14) was unconstitutional where duck hunting is the sole purpose to be served by the taking. He claimed

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[20] Kojis v. Doctor's Hospital, *supra* note 18.
[21] See 68 A.L.R. 2d 1437 (1959).
[1] Branch v. Oconto County, 13 Wis. 2d 595, 109 N.W. 2d 105 (1961).
[2] WIS. STAT. §23.09(14) (1959):
WAYS TO WATERS. The county Board of any county may condemn a right of way for any public highway to any navigable stream, lake, or other navigable waters. Such right of way shall not be less than sixty feet in width, and may be condemned in the manner provided by chapter 32; but the legality or constitutionality of this provision shall in nowise affect the legality or constitutionality of the rest of this section.